Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

JULIETTE IRVING,
as Guardian of the Person and Property of
Bryana Bashir, and as Administratrix of
the Estate of Bonita L. Irving, Deceased,
Petitioner,

V.

MAZDA MOTOR CORPORATION;
MAZDA (NORTH AMERICA), INC.;
MAZDA MOTOR OF AMERICA, INC.; and
AUTOALLIANCE INTERNATIONAL, INC.,
Respondents.

Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the Eleventh Circuit correct when it held that the common law of the fifty states -- a field that has traditionally been occupied by the historic police powers of the sovereign states -- was superseded and pre-empted by Congress in passing the National Traffic and Motor Vehicle Safety Act of 1966 by ruling that an auto maker's compliance with minimum federal safety standards pre-empts common law claims when the Safety Act provides that compliance with those standards does not exempt manufacturers from common law liability and the legislative history of the Act makes clear that Congress did not intend to pre-empt claims such as Petitioner's?

2. Even if the Eleventh Circuit was correct in pre-empting a common law claim alleging a defective and unreasonable design of an automobile restraint system that was permitted under regulations promulgated under the National Traffic and Motor Vehicle Safety Act, was it correct in pre-empting Petitioner's claims based on inadequate warnings where there was no requirement in the regulations regarding the language of required warnings?

3. Did the Eleventh Circuit err when it concluded the National Traffic and Motor Vehicle Safety Act does not contain the clear and manifest intent of Congress to expressly pre-empt state common law claims under the precedents of this Court, but it went on to find those claims were impliedly pre-empted even though such a conclusion still requires a finding that Congress intended to pre-empt those claims and is required to express that intent sufficiently clear to overcome presumptions against pre-emption?

PARTIES TO PROCEEDINGS

To the best of Petitioner's knowledge, the caption contains all of the parties to this action.

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1. *Irving v. Mazda Motor Corporation*, 136 F.3d 764 (11th Cir.1998). Appeal No. 97-8021. Jurisdiction: 28 U.S.C. § 1291 (review of final judgment of district courts).

2. *Irving v. Mazda Motor Corporation*, Civil Action No. 1:94-CV-2964-HTW (U.S.D.C. for the N.D. Ga. November 22, 1996). Jurisdiction: 28 U.S.C. § 1332 (diversity of citizenship and amount in controversy).

3. *Irving v. Mazda Motor Corporation*, Order denying Petition for Rehearing and Suggestion of Rehearing En Banc. Appeal No. 97-8021. Entered May 4, 1998.

JURISDICTION

This Court has jurisdiction to review the decisions of the Eleventh Circuit Court of Appeals pursuant to 28 U.S.C. § 1254(1). The district court granted summary judgment against Petitioner on November 22, 1996. The Eleventh Circuit upheld the district court on March 5, 1998. The Eleventh Circuit denied rehearing on May 4, 1998, and this Petition was timely filed pursuant to Supreme Court Rule 13 within 90 days thereof.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments. Whenever a Federal motor vehicle safety standard established under this subchapter is in effect no State or political subdivision of a State shall have any authority either to establish, or to continue in effect with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) Pre-emption. (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political

subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise applicable standard under this chapter. (2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

(e) Common Law Liability. Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law

All of the applicable pre-emption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This petition, therefore, uses the citations employed in those decisions.

STATEMENT OF THE CASE

On November 19, 1993, Bonita Irving, a young, single mother, was killed when the 1990 Mazda MX-6 she was driving left the roadway of Georgia Highway 54 and rolled over. Even though the occupant space of the vehicle was not significantly compromised, she died as a result of being ejected from the vehicle during the rollover. Petitioner contended below that Ms. Irving would have remained in the vehicle and survived had the passive or automatic seat belt system in the MX-6 included an automatic lap belt or if she had fastened the manual lap belt

provided in the car.

The front seating positions of the 1990 Mazda MX-6 were equipped with a passive restraint system. That system included an automatic shoulder belt that traveled along the interior roof rail above the doors; it closed around the occupant when the doors were shut and moved forward when the doors were opened to allow occupants to enter and exit the seats. Additional components of the passive restraint system included a ramped or inclined seat pan and energy absorbing "knee bolsters" in the lower dashboard or instrument panel. The ramped seat bottom and the knee bolsters were designed to provide passive or automatic restraint of occupants' lower bodies in frontal collisions. This function of restraining an occupant's lower body in a frontal collision is performed in other restraint systems by the lap belt. While not a part of the passive or automatic restraint system, a manual lap belt was provided but was not worn by Ms. Irving at the time of this incident.

Petitioner is the mother of Ms. Irving and the administratrix of her estate. Petitioner commenced the underlying action under the common law of the state of Georgia on theories of negligence, strict product liability for design defect and for failure to provide adequate warnings, and breach of warranty. Generally speaking, Petitioner contends that the occupant restraint system of the MX-6 is only half-passive because a lap belt is an essential part of the restraint system and the only means of effective restraint in a rollover collision. Petitioner contends the system is unreasonably dangerous as designed, and, at a minimum, Mazda owed a duty to warn occupants of the unique risks associated with this half-passive system.

Mazda filed a motion for summary judgment in the

district court arguing that the law of the state of Georgia was pre-empted by federal statutes and regulations pertaining to motor vehicle safety. The National Traffic and Motor Vehicle Safety Act ("Safety Act") was enacted in 1966. That statute created the National Highway Traffic Safety Administration whose obligations included formulating and promulgating federal standards with which all vehicles sold in the United States must comply. One such standard is Federal Motor Vehicle Safety Standard ("FMVSS") 208 which relates to occupant restraint systems. Petitioner does not contend the 1990 MX-6 violated FMVSS 208, and for the purposes of the pre-emption motions, arguments and appeals has conceded that it complies with that regulation.

Mazda contended below that Petitioner's claims and the common law of the state of Georgia are pre-empted by the Safety Act because the MX-6 complied with FMVSS 208 and because a finding that the restraint system included in this case is defective or that Mazda was negligent in designing it would result in a standard under state law that is inconsistent with the standard under federal law. Two original provisions of the Safety Act are relevant here. One section, 15 U.S.C. § 1392(d), provides that, where a safety standard is in effect, states may only prescribe regulations or standards that are identical. Mazda contended below, and the lower courts agreed, that this portion of the statute pre-empts state common law claims that would challenge designs which comply with FMVSS 208. Another portion of the Safety Act, 15 U.S.C. § 1397(k), provides that "[c]ompliance with any motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Petitioner contends that this provision provides the clearest intent of Congress as to the pre-emptive effect of the Safety Act, and Petitioner's claims

and the law of the fifty states are not pre-empted solely because an automobile complies with minimum federal standards with which all cars must comply before they may be lawfully sold.

The district court sustained the Mazda defendants' motion for summary judgment and found Petitioner's claims pre-empted. Petitioner appealed to the Eleventh Circuit of the U.S. Court of Appeals under 29 U.S.C. § 1291. The Eleventh Circuit entered judgment against Petitioner as well, and this Petition for a Writ of Certiorari to that court is made pursuant to 28 U.S.C. § 1294(1).

REASONS FOR GRANTING THE WRIT

There are three reasons why this case is a proper exercise of this Court's discretionary supervisory power. First, the Eleventh Circuit's opinion in this case conflicts directly with opinions from the highest courts in six states that have addressed the important federal question of whether the historic police powers of the states is pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966. Those states, as discussed below, have held their laws are not pre-empted. Litigants with identical claims are handed opposite results depending on the forum in which their claims are brought. If the claim is brought in the courts of six of the eight states whose highest courts have addressed this issue, the claims of those litigants are decided by juries. If the same claim is brought in the three circuits that have addressed this issue since recent pre-emption decisions by this court, that claim is pre-empted and summary judgment is entered against the litigant.

Second, the Eleventh Circuit's opinion and pre-emption analysis in this case conflicts with recent precedent

of this Court. In *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996), this Court ruled that a similar statutory scheme did not evidence Congress's intent to pre-empt state common law. That case involved a statute with language similar to the Safety Act at issue in this case, but the statute in *Medtronic* did not have a savings clause such as the one present in the Safety Act that provides, "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." This additional indicium of Congress's intent and the presumptions against pre-emption set forth in *Medtronic* were given no consideration in the Eleventh Circuit's analysis or ruling. Additionally, this Court's decisions in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) and *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), provide for analysis to be undertaken in evaluating the pre-emptive reach of a federal statute which were not a part of the Eleventh Circuit's conclusion in this case.

Third, this case turns on the resolution of an important federal question. In what instances and the extent to which federal statutes supplant and nullify the law of the sovereign states is a matter of extreme importance to the balance of our federal system and the comity of state and federal court systems operating in that system. The traditional powers of the states embodied in the development and application of their tort laws and civil justice systems should not be displaced because that result is arguably consistent with certain selected passages of a large federal act. Congress should clearly express its intent to exercise its powers under the supremacy clause of the Constitution before pre-emptive effect is given to a statute, and this Court has so held. The conflict between federal courts deciding this question and the states' highest courts

reaching opposite results highlights this importance. Most of the states have held their law is not nullified by the Safety Act; federal courts have tended to expand the federal government's role at the expense of those states. The importance of this federal question at this juncture is manifest.

A. There is a Direct Conflict Between the Decisions of Six of the Eight State Courts of Last Resort that Have Decided this Issue and the Three U.S. Circuit Courts of Appeals that Have Decided this Issue Since Recent Relevant Decisions of this Court.

The highest courts of the states of Arizona, Indiana, New Hampshire, New York, Ohio and Texas have ruled that design defect and negligence claims similar to Petitioner's claim in this case are not pre-empted by the National Traffic and Motor Vehicle Safety Act of 1966. *Hernandez-Gomez v. Volkswagen of America, Inc.* 917 P.2d 236 (Ariz. 1996); *Wilson v. Pleasant and General Motors Corp.*, 660 N.E. 2d 327 (Ind. 1995); *Ford Motor Company v. Tebbetts*, 165 A.2d 345, 140 N.H. 203 (N.H. 1995); *Drattel v. Toyota Motor Corp.*, (N.Y. Ct. App., No. 65, June 16, 1998); *Nelson v. Ford Motor Company* 670 N.E. 2d 307 (Ohio Ct. App. 1996); *Hyundai Motor Co. v. Alvarado*, (Sup. Ct. of Texas, No. 95-0969, June 5, 1998). Intermediate appellate courts in California, Missouri, and Oklahoma have agreed. *Ketchum v. Hyundai Motor Company*, 57 Cal. Rptr. 2d 595, 599, 49 Ca. App. 4th 1672 (Cal. App. 2 Dist. 1996); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994); *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995). Mississippi and Pennsylvania have ruled such claims are pre-empted. *Cellucci v. General Motors Corp.*, 676

A.2d 253 (Pa. Super. 1996); *Cooper v. General Motors Corp.*, 702 So.2d 428 (Miss. 1997).

Ruling with the benefit of this Court's recent decisions of *Cipollone*, *Freightliner*, and *Medtronic*, the U.S. Courts of Appeals for the Ninth, Tenth, and Eleventh Circuits have found such claims are pre-empted by the Safety Act. *Harris v. Ford Motor Co.*, 110 F.3d 1410 (9th Cir. 1997); *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414 (10th Cir. 1996); *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998). The Eleventh Circuit has not consistently taken this position, however, as it allowed such a claim to proceed in *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139 (11th Cir. 1996). The *Doyle* decision was never mentioned in the Eleventh Circuit's underlying opinion in this case, however, leaving one to conclude that whether a litigant's claim will get to a jury in that circuit depends more on the panel he or she draws than on the consistent application of law.

Until this Court addresses the express issue presented by this case -- whether Congress intended the Safety Act to pre-empt claims challenging designs of automobile equipment permitted under minimum federal safety standards -- litigants will continue to be handed opposite results on identical cases depending on the forum in which a particular case is brought. Supreme Court Rule 10(a) provides that considerations of this Court in exercising is discretionary powers of review include the circumstance where a federal court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort. Here, three circuits have recently reached an opposite result of the overwhelming majority of state courts deciding this issue.

The stark nature of this conflict is highlighted by the experiences of lead counsel for Petitioner. A virtually identical claim was tried to a jury by lead counsel last October in St. Louis County, Missouri. *Meyer v. Mazda Motor Corporation*, Cause No. 685669. The jury trial of another nearly identical case is currently set for October 6, 1998 in Fort Bend County, Texas. *Dickerson v. Mazda Motor Corporation*, Cause No. 94,239. Lead counsel and other lawyers have cases pending in state courts across the country which set forth claims nearly identical to Petitioner's. The parties to those cases will have their claims resolved by juries empowered by the common and statutory law of those states.

The experiences of Petitioner, however, and those like her in the Ninth and Tenth Circuits are very different. The claims are the same. The forums are different. And, based solely on the differences in forums, the results are opposite.

These opposite results are not attributable to factual differences from case to case. The question presented in each turns on whether Congress intended to pre-empt the claims in passing the Safety Act. Just as these opposite results present a true conflict rather than a false one, litigants and courts are not served by additional time for this issue to percolate through state and federal appellate courts. The chasm is clear. State courts are reluctant to find their law displaced; federal courts of appeals seem to have an easier time reaching that conclusion. This Court should exercise its supervisory powers to resolve this recurring issue and restore uniformity to the handling of these cases by courts. By doing so, it could restore a sense of justice to this process and prevent others from suffering the fate of Petitioner who is left with the conclusion that

her case would have been decided by a jury if only it could have been filed in a different court.

B. The Eleventh Circuit Decided this Important Federal Question in a Way that Conflicts with Recent Relevant Decisions of This Court.

1. This Court has Recently Reiterated That a Presumption Against Pre-emption Exists and Congress Must Clearly Manifest its Intent to Pre-empt to Overcome That Presumption.

Two terms ago, this Court addressed similar statutory language to regarding the pre-emptive effect of the Medical Device Amendments of 1976 in *Medtronic, Inc. v. Lohr*, 116 S.Ct. 2240 (1996). Embarking on that analysis, a majority of this Court noted its interpretation of that statute is informed by two presumptions about pre-emption.

> "First, because the States are independent sovereigns in our federal system, we have long presumed Congress does not cavalierly pre-empt state law causes of action. In all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. ... That approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.
>
> "Second, our analysis of the scope of the statute's pre-emption is guided by our oft-repeated comment

> ... that the purpose of Congress is the ultimate touchstone in every pre-emption case. As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of congressional purpose." Id. at 2250 (citations and quotations deleted).

The Eleventh Circuit's decision in this case did not pay heed to this presumption. That court did not find sufficient expression of Congressional intent to hold Petitioner's claims were expressly pre-empted. In fact, it found no such sufficient expression of intent was present. It proceeded from that conclusion, however, to conduct an implied pre-emption analysis which was blind to the presumption. No further mention of it was made, and no consideration to it was given. The court, in fact, left the topic of the statute and decided implied pre-emption existed based on the language of the relevant agency's regulations. *Irving*, 136 F.3d at 768 (finding "Congress specifically intended the standard to give manufactuers a choice ... " when the standard at issue was proposed more than ten years after Congress passed the Safety Act and could not have been an indicium of congressional intent). As quoted above, pre-emption occurs where such is the intent of Congress, not the regulating agency. Had the Eleventh Circuit followed this Court's recent precedent and given effect to the presumption identified above, it would have reached a different conclusion.

2. The Eleventh Circuit's Finding that Petitioner's Claims Were Impliedly Pre-empted Does Not Follow Recent Decisions of this Court.

For twenty years after the Safety Act's 1966

enactment, the nation's appellate courts unanimously agreed that the Safety Act does not pre-empt common law claims. In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 181, expanding the implied pre-emption doctrine to find certain common law claims involving cigarettes pre-empted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied pre-emption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood*, 865 F.2d 395, in which General Motors was arguing, as it had repeatedly argued in the past that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard - specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly (but not expressly) pre-empted by the Safety Act, despite Congress' clear statement of anti-pre-emptive intent. *Wood*, 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, albeit on varying rationales. *See Pokorny*, 902 F.2d 1116 (3rd Cir. 1990); *Kitts*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990); *Taylor*, 875 F.2d 816 (11th Cir. 1989), *cert denied*, 495 U.S. 1065 (1990).

In 1992, however, this Court issued its decision in

Cipollone, 112 S. Ct. at 2608, explicitly rejecting the Third Circuit's (and its sister courts) expansion of the implied pre-emption doctrine. In a portion of the opinion joined by seven member's of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in. . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

112 S. Ct. at 2618. Thus, *Cipollone* held that the lower courts had erred in finding implied pre-emption of any common law claims involving cigarettes and that only *express* pre-emption analysis should have been employed. *Id.*

The *Cipollone* decision effectively overruled the decisions finding implied pre-emption under the Safety Act. It should have returned the lower courts to their unanimous view that the Safety Act expressly preserves all common law claims. And it probably would have done so, if not for the confusion caused by *Freightliner*.

In *Freightliner*, this Court reviewed the first decision by a federal appeals court or state court of last resort to interpret the Safety Act's pre-emptive effect after this Court's decision in *Cipollone*. In the decision being

reviewed, *Myrick*, 13 F.3d at 1522, the Eleventh Circuit first stated *Cipollone's* teaching broadly, noting "*Cipollone's* clear instruction that when there is an express pre-emptive provision we should not consider implied pre-emption. It later said, however, that "at the very least" *Cipollone* "establishes there is a presumption that a pre-emption clause is a reliable indicium of congressional intent" and that "[e]ven without such a presumption we would be convinced that the express pre-emption provisions of the Safety Act are a reliable indicium of congressional intent." *Myrick*, 13 F.3d at 1525. The Eleventh Circuit concluded that *Cipollone* negated its prior implied pre-emption decision in *Taylor*, that section 1397(k) barred resort to implied pre-emptive analysis under *Cipollone*, and that the Safety Act expressly preserves all common law claims. *Myrick*, 13 F.3d at 1522-28.

In *Freightliner*, 514 U.S. 518 (1995), this Court affirmed on alternative grounds, but issued a decision that has created great confusion as to whether implied pre-emption analysis is appropriate under the Safety Act. Perhaps focussing on the Eleventh Circuit's broadest summary of *Cipollone's* impact, the Court said that the Eleventh Circuit had misread *Cipollone* to hold "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute" and rejected that position as "without merit." *Freightliner*, 115 S. Ct. at 1487. The Court then attempted to clarify the proper approach to pre-emption analysis, saying:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express

> clause entirely forecloses any possibility of implied pre-emption... At best, *Cipollone* supports an inference that an express pre-emption clause forecloses implied pre-emption; it does not establish a rule.

Freightliner, 115 S. Ct. at 1488.

In regard to *Cipollone*, these statements made perfect sense. The two statutes at issue in *Cipollone* contained express pre-emption clauses (but, unlike, the Safety Act no express *anti-pre-emption* clause). The fact that Congress thought to include those express clauses in the statutes did not without more, necessarily mean that Congress also thought of all other aspects of state law that might be pre-empted by the statutes -- and intended to preserve them.

In the Safety Act however, there is more than just an express pre-emption clause. There is an express *anti-pre-emption* clause explicitly preserving all common law claims. In *Freightliner*, however, this Court did not acknowledge that fact. Instead, it simply said the Eleventh Circuit's interpretation of *Cipollone* was "without merit" and then made the statements quoted above. *Freightliner*, 115 S. Ct. at 1487-88. As a result *Freightliner* has created extensive confusion as to whether section 1397(k) precludes a resort to implied pre-emption under the Safety Act.

The confusion caused by the discussion of *Cipollone* in *Freightliner* was massively compounded by the pre-emption analysis actually employed in *Freightliner*. *Cipollone* stressed the importance of focusing on the words Congress used to determine whether express pre-emption exists. In *Freightliner*, however, this Court did not reach the question of whether 15 U.S.C. § 1392(d) expressly pre-

empts common law claims or 15 U.S.C. § 1397(k) expressly preserves them. *Freightliner*, 115 S. Ct. at 1487 n.3. Instead, it rejected express pre-emption solely because section 1392(d), by its terms, only applies, "whenever a Federal motor vehicle safety standard is in effect" with respect to the relevant "aspect of performance" and no such Federal standard was in effect with regard to the aspect of performance (truck stopping distances) at issue in the case. *Freightliner*, 115 S. Ct. at 1147. This has prompted some courts -- including the District Court of Northern Georgia - to hold (incorrectly) that *Freightliner* affirmatively supports a finding of express pre-emption whenever a Federal safety standard is in place, despite the clear words of the savings clause.

In addition, *Cipollone* stressed the importance of focusing on the words Congress used to determine whether resort to implied pre-emption analysis is proper, but *Freightliner* did not follow that step. Instead, without reaching respondents' arguments about the words Congress used, id. at 1487 n.3 (and after saying the Eleventh Circuit misinterpreted *Cipollone* as unduly barring implied pre-emption), the Court rejected the petitioners' pre-emption argument as "ultimately futile" because respondents' common law claims did not "conflict with federal law" sufficiently to warrant a finding of implied pre-emption. *Freightliner*, 115 S. Ct. at 1488. This has prompted some courts to hold (incorrectly) that *Freightliner* mandates resort to -- and even a finding of -- implied pre-emption under the Safety Act.

Thus, while *Freightliner* may have clarified the proper approach to pre-emption analysis in cases like *Cipollone*, where the statutes involved contain only express pre-emption clauses, it has created massive confusion

among the lower courts about the pre-emptive affect of the Safety Act. Only this Court can resolve that confusion. To do so, it should grant review in this case and answer the critically-important federal question presented.

C. Whether the Safety Act Pre-empts Common Law Claims is An Important Recurring Question of Federal Law.

The question of federal law presented by this case is extremely important. It boils down to this: whether courts are free to disregard the argument against pre-emption, contravene Congress' plainly-stated intent, and exempt manufacturers from liability under state common law by judicial decree. Mazda Motor Corporation and its fellow manufacturers agree that the question presented is important. Recently, they jointly urged this Court to decide whether compliance with Standard 208 renders them immune from common law liability. *Ford Motor Company v. Tebbetts,* No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition. They simply maintain that the answer is "yes," even though it is "no."

The decision below and the implied pre-emption decisions contravene Congress' plain statement of intent. Congress could hardly have said it more clearly: "Compliance with any Federal motor vehicle safety standard ... shall not exempt any person from any liability under common law." 15 U.S.C. § 1397(k). As the United States explained in its *amicus* brief to this Court in *Freightliner:*

> [U]nder a straightforward reading of Section 1392(d) and Section 1397(k), taken together,

> States are pre-empted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance... State courts, however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for the United States as *Amicus Curiae* Supporting Respondents, at 16.

If the plain words of the Safety Act left any question as to Congress' intent in regard to common law claims, it would surely be answered by the statute's legislative history. The House Committee, which added section 1397(k) to the Safety Act explained its purpose in clear and unequivocal terms:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly* those relating to warranty, contract, and *tort liability.*

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

Given the foregoing, the decision below is plainly in error, as are those cases resorting to implied pre-emption analysis. In both *Cipollone* and *Medtronic*, this Court

found that Congress's enactment of express pre-emption provisions, standing alone, barred resort to implied pre-emption principles, even though the members of the Court disagreed vehemently as to the meaning of the express pre-emption provisions. See *Cipollone*, 112 S. Ct. at 2618; *Medtronic*, 116 S. Ct. at 2250. Here, Congress enacted both an express pre-emption provision and an express anti-pre-emption provision explicitly preserving the aspect of state law at issue. To allow implied pre-emption under these circumstances would render the limitations imposed on implied pre-emption in *Cipollone* and *Medtronic* meaningless -- and make implied pre-emption analysis a tool for wholesale judicial activism and the widespread evasion of Congress's intent.

Moreover, even if implied pre-emption could properly be considered under the Safety Act claims like Petitioner's still would not be pre-empted. There simply is no conflict between plaintiffs' claims and Standard 208. It is true that Standard 208 required all 1990 model-year cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device providing automatic protection in head-on and angular crashes. It is equally true that Mazda, which chose the second option, could have installed a door-mounted passive restraint system (or for that matter, an airbag) in Bonita Irving's 1990 Mazda MX-6 rather than the automatic shoulder harness and knee bolster it installed, and still have complied with that option under Standard 208. And it is obvious that, if Mazda had taken that step, Bonita Irving's 1990 Mazda MX-6 would have been safer. If, by failing to install a door-mounted passive belt system, Mazda violated Georgia common law and caused Bonita Irving's death, Congress did not intend to exempt Mazda

from liability. Section 1397(k) makes that fact plain.

This Court has repeatedly refused to find that Congress intended to deprive tort victims of common law remedies, even when Congress has not expressly preserved common law claims, saying "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic*, 116 S. Ct. at 2251 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). In this case, Congress did comment and it expressly *preserved* all common law claims. This Court should grant review to ensure that Congress' intent is respected and that Juliette Irving -- and thousands of similarly situated Americans -- are not illegally denied their day in court.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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Juliette IRVING, as Guardian of the Persons and Property of Bryana Bashir, and as Administratrix of the Estate of Bonita L. Irving, Deceased, Plaintiff-Appellant,

v.

MAZDA MOTOR CORP., a.k.a. Mazda Motors Corp., f.k.a. Toya Kogyo, Ltd., Mazda (north America), Inc., et al., Defendants-Appellees.

No. 97-8021.

United States Court of Appeals,
Eleventh Circuit.

March 5, 1998.

Before HATCHETT, Chief Judge, and EDMONDSON and COX, Circuit Judges.

EDMONDSON, Circuit Judge:

Plaintiff appeals the district court's grant of summary judgment for Defendants. The district court decided that Plaintiff's state law claims were preempted by federal law. We conclude that Federal Motor Vehicle Safety Standard ("FMVSS") 208, 49 C.F.R. § 571.208, (enacted under the authority of the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 et seq.) does preempt Plaintiff's state law claims. And, we affirm the grant of summary judgment.

Background

Plaintiff Juliette Irving filed suit against Defendant Mazda Motor Corporation on behalf of her daughter, Bonita Irving. Bonita was killed in a single-car accident while driving a 1990 Mazda MX-6. After her daughter's death, Plaintiff filed this suit claiming that the seat belts in the MX-6 were defectively designed and that Mazda failed to warn consumers adequately of the risks of not utilizing all portions - particularly the manual lap belt portion - of the safety belt system.

The safety belt system used in the Mazda MX-6 included a two-point passive shoulder restraint (automatic shoulder belt) with a manual lap belt. The kind of restraint system was one of three options provided to car manufacturers by FMVSS 208. Plaintiff contends the design represented by this option was defective.

Defendants filed a motion for summary judgment claiming that FMVSS 208 both expressly and impliedly preempts state law (including common-law) claims and that no recovery can be had on a claim based on the use of a design permitted by the federal standards. The district court granted this motion and - concluding that Plaintiff's failure-to-warn claim was dependent upon the design-defect claim - also dismissed Plaintiff's failure-to-warn claim.

Discussion

Whether Plaintiff's state law claims are preempted under the federal law is reviewed by this Court *de novo*. *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1498 (11th Cir.) *cert. granted*, ___U.S.___, 118 S.Ct. 439, 139 L.Ed.2d 337 (1997).

I. Preemption: Defective-Design Claim

The Supremacy Clause of the Untied States' Constitution provides that the laws of the United States "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI. Thus, state law that conflicts with federal law is "without effect." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992) (citing *Maryland v. Louisiana*, 451 U.S. 725, 744-46, 101 S.Ct. 2114, 2128, 68 L.Ed.2d 576 (1981)). And, "common law liability may create a conflict with federal law, just as other types of state law can." *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3d Cir. 1990); see also *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662-64, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993).

Whether federal statutes or regulations preempt state law is "a question of congressional intent." *Perry v. Mercedes Benz of North America, Inc.*, 957 F.2d 1257, 1261 (5th Cir. 1992); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, ___ _ ___, 116 S.Ct. 2240, 2250, 135 L.Ed.2d 700 (1996) ("The purpose of Congress is the ultimate touchstone in every preemption case.") (internal quotations and citation omitted). Congress - through federal laws and regulations - may effectively preempt state law in three ways: (1) express preemption; (2) field preemption (regulating the field so extensively that Congress clearly intends the subject area to be controlled only by federal law); and (3) implied (or conflict) preemption. Defendants claim that the National Traffic and Motor Vehicle Safety Act of 1966 ("the Act") both expressly and impliedly preempts Plaintiff's claims.

A. Express Preemption

"[A] strong presumption exists against finding express preemption when the subject matter, such as the provision of tort remedies to compensate for personal injuries, is one that has traditionally been regarded as properly within the scope of the states' rights." *Taylor v. General Motors Corp.* , 875 F.2d 816, 823 (11th Cir. 1989)[1] (citation omitted). Thus, express preemption clauses must be construed narrowly. *Taylor*, 875 F.2d at 823-24.

Defendants first contend that Plaintiff's design-defect claim is expressly preempted by the preemption clause of the Act. That clause makes this statement:

> When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe

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[1] Our pronouncements in *Taylor* were partially abrogated by *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1521-22 (11th Cir. 1994), where we wrote that the Supreme Court's decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), would not permit an analysis of implied preemption where an express preemption clause existed in the relevant federal law. But, the Supreme Court reviewed *Myrick* on appeal and, although affirming the outcome, stressed that implied preemption is possible despite the presence of an express preemption clause. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 286-87, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 385 (1995). Thus, *Taylor* is correct and can be used for evaluating preemption of state law.

> or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter....

49 U.S.C. § 30103(b)(1) (formerly 15 U.S.C. § 1392(d). But, the Act also contains a savings clause which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law." 49 U.S.C. § 30103(e) (formerly 15 U.S.C. § 1397(k). Thus, "[t]he question of express preemption is properly analyzed only after considering both § 1392(d) *and* § 1397(k)." *Pokorny*, 902 F.2d at 1120 (citing *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 512-13, 101 S.Ct. 2478, 2492, 69 L.Ed.2d 185 (1981).

In *Taylor*, after reading these two sections together, we determined that the conflict between them made the preemption of common-law claims ambiguous. Thus, the presumption against preemption controlled; and no express preemption could be found. *Taylor*, 875 F.2d at 825.

We also considered express preemption for the Federal Boat Safety Act ("FBSA"), in *Lewis v. Brunswick Corp.*, 107 F.3d 1494. The FBSA contains language similar to that of the National Traffic and Motor Vehicle Safety Act, containing both a preemption clause and a savings clause.[2]

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[2] The pertinent portions of the FBSA read this way:

> [A] State or a political subdivision of a State may not establish, continue in effect, or

Again we (as in *Taylor*) read the preemption clause narrowly and said that the FBSA's preemption clause did not cover common-law claims. *Lewis*, 107 F.3d at 1501. *Taylor* and *Lewis* point to the same conclusion for this case.[3] So, Plaintiff's defective-design claim is not expressly preempted by the Act.

B. Implied Preemption

Conflict preemption exists where state law actually conflicts with federal law, making it impossible to comply with both, or where the stat law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Lewis*, 107 F.3d at 1500 (internal quotations and citation omitted).

> enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment ... that is not identical to a regulation prescribed under ... this title.

49 U.S.C. § 4306. The FBSA further provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law." 46 U.S.C. § 4311(g)

[3] This conclusion is the same as that reached by other circuits. *See, e.g., Perry*, 957 F.2d at 1264; *Pokorny*, 902 F.2d 787, 789 (10th Cir. 1989) (adopting *Wood v. General Motors Corp.*); *Wood v. General Motors Corp.*, 865 F.2d 395, 402 (1st Cir. 1988).

The existence of an express preemption clause does not necessarily preclude the presence of implied preemption. *Freightliner Corp., v. Myrick*, 514 U.S. 280, 286-90, 115 S.Ct. 1483, 1487-88, 131 L.Ed.2d 385 (1995). Thus, if Plaintiff's state law claim conflicts with FMVSS 208 or if her claim would hinder Congress's objectives in passing the Act, the state law will be preempted.

FMVSS 208 directly addresses the kinds of restraint systems permitted to be used by car manufacturers. It allows manufacturers to choose from three options: (1) a complete passive restraint system (automatic seat belts with or without air bags); (2) passive protection for frontal crashes (for example, automatic shoulder belts or air bags) plus manual lap belts for lateral crashes and roll-overs with a seat belt warning system; or (3) manual lap and shoulder belts with a seat belt warning system. FMVSS 208; *Perry*, 957 F.2d at 1260.

Defendants chose the second option - installing two-point passive shoulder restraints with manual lap belts. That Congress specifically intended the standard to give manufacturers a choice should preempt common-law claims that two-point passive shoulder belts, paired with manual lap belts, constitute inherently a design defect. *See Pokorny*, 902 F.2d at 1123 (actual conflict exists with the Act and FMVSS 208 to the extent a claim would stand for a manufacture's choice of an option provided by the standards).

i. An argument made for the first time on appeal.

As we understand the record, Plaintiff's claim in district court was not that a differently designed two-point

system with a manual lap belt would have been without defect.[4] On the contrary, Plaintiff based her claim on the allegation that the option provided in the standards represented inherently a defective design. "Plaintiff allege[d] that the option selected by Mazda is defective." Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 12.

Plaintiff, however, seems to argue for the first time in this appeal that different, nondefective designs could have been selected by Defendants under the same regulatory option automatic shoulder belt with manual lap belt. thus, Plaintiff now argues that she is not challenging Defendants' choice of a regulatory option. This argument differs from Plaintiff's argument in the district court.[5] Too often our

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[4] If a claim was asserted that two-point systems (such as that installed in the Mazda MX-6) were not defective in general, but that the specific design selected by Mazda for its two-point system was unreasonably dangerous, preemption would be less clear.

[5] The option selected by Defendants permitted passive protection for frontal crashes - either air bags or passive shoulder harnesses - plus lap belts for lateral crashes. The only alternative designs put forward by Plaintiff in the district court were three-point seat belts, fully automatic belts, and restraint systems with more elaborate warning systems. These alternatives do not fall within the regulatory option exercised by Defendants. A three-point seat belt system would have to be either fully passive (for example, the seat belt is attached to the car door and is positioned upon closing the door) or fully manual (requiring passenger action to position the restraint),

colleagues on the district courts complain that the appellate cases about which they read were not the cases argued before them. We cannot allow Plaintiff to argue a different case from the case she presented to the district court. Because Plaintiff failed to make this argument in the district court, we decline to consider it here. *See Narey v. Dean*, 32 F.3d 1521, 1526-27 (11th Cir. 1994).

ii. The argument made in district court.

When considering implied preemption, no presumption exists against preemption. "Under the Supremacy Clause of the Federal Constitution, '[t]he

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which would place that system in either of the two options not selected by Defendants. The option exercised by Defendants allowed for a partially passive, partially manual restraint system. For the same reason, a fully automatic belt system also would not fall under the same option selected by Defendants. Finally, the warning systems proposed by Plaintiff would have been different from the warning system specifications set out for the option selected by Defendants, with which specifications Defendants indisputably complied.

In the district court, Plaintiff stated that she was "not suggesting that the options be taken away; rather, Plaintiff alleges that *the option selected by Mazda is defective.*" Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 12 (emphasis added). To sharpen this point more, Plaintiff went so far as to challenge the appropriateness of FMVSS 208. *See id.* at 2 ("[A]lthough the restraint system may comply with the minimum standards, the standards are inadequate and should not impede the progress towards improved designs.").

relative importance of the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" *Lewis*, 107 F.3d at 1502 (citation omitted).

Because Plaintiff sued Defendants for exercising an option expressly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design. *Taylor*, 875 F.2d at 827 ("[A] state cannot impose common law damages on individuals for doing what a federal act or regulation 'authorized them to do.'") (quoting *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318-20, 101 S.Ct. 1124, 1131, 67 L.Ed.2d 258 (1981)). Therefore, Plaintiff's suit against Defendants for their exercise of an option provided to Defendants by FMVSS 208 conflicts with federal law and, thus is preempted.

II. Failure-to-Warn Claim

In addition to granting Defendants' motion for summary judgment on Plaintiff's claim of defective design, the district court also dismissed Plaintiff's failure-to-warn claim. The district court said that "[s]ince plaintiff's defective design claims are preempted, the court will not address plaintiff's failure to warn claim, *as it premised on a defective design.*" District Court Order at 8 n.8 (emphasis added).

Plaintiff argues on appeal that a failure-to-warn claim is separate from and not dependent upon a defective-design claim. As a general statement of law, Plaintiff's proposition is often correct. *See, e.g., Michael v. Norfolk*

Southern Ry. Co., 74 F.3d 271 (11th Cir. 1996) (applying Georgia law); *see also Sheckells v. AGV-USA Corp.*, 987 F.2d 1532, 1533 (11th Cir. 1993) (applying Georgia law); *Stapleton v. Kawasaki Heavy Indus., Ltd.*, 608 F.2d 571, 572-73 (5th Cir. 1979) (applying Georgia law). But, in this case Plaintiff (not the district court or Defendants) tied the claims of defective design and failure of warn together. In Plaintiff's opposition to Defendants' motion for summary judgment, she argued that she would ask the jury to find that "the 1990 Mazda MX-6 equipped with the two-point motorized shoulder belt and manual lap belt option is defective without plaintiff's desired warning."[6] Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 23.

Because Plaintiff's defective-design claim is preempted by FMVSS 208, there was no defect about which to warn. Plaintiff's failure-to-warn claim - which is, in this case, dependent on the preempted defective-design claim - was properly dismissed.

AFFIRMED.

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[6] Plaintiff presented several warning systems as safer alternatives to the system present in the 1990 Mazda. The Mazda warning system included a buzzer, a light indicating a failure to secure the lap belt, and a written warning on the sun visors on both the driver and passenger sides of the car. Plaintiff alleges these warnings were inadequate. But, Plaintiff does not dispute that the warnings provided in the 1990 Mazda fully complied with the federal standards. *See* FMVSS 208 at S7.3; 49 C.F.R. § 571.208, S.5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JULIETTE IRVING, As Guardian of the Person and Property of BRYANA BASHIR, and As Administratrix of the Estate of BONITA L. IRVING, Deceased,	)	
Plaintiff,	)	
vs.	)	Civil Action 194CV2964HTW
MAZDA MOTOR CORPORATION, aka MAZDA MOTORS CORP., fka TOYO KOGYO, LTD., et al.,	)	
Defendants.	)	

ORDER OF COURT

This matter currently is pending before this court on (1) the Mazda defendants' motion for summary judgment, and (2) the Mazda defendants' motion to extend time to file a pretrial order.[1]

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[1] These motions are brought by defendants Mazda Motor Corporation; Mazda Motor of America, Inc.; Mazda (North America), Inc.; and AutoAlliance International, Inc. (collectively, the "Mazda defendants" or "defendants").

DISCUSSION

The Mazda Defendants' Motion for Summary Judgment

1. Facts

On November 19, 1993, plaintiff's decedent, Bonita Irving, was involved in a single-car accident while driving her 1990 Mazda MX-6 on Georgia Highway 54 in Coweta County, Georgia. Ms. Irving was killed instantly when she lost control of her car, it left the rad and rolled over, and she was ejected. There is no allegation that the Mazda defendants are responsible for the vehicle leaving the roadway or rolling over. The car at issue, bearing vehicle identification number 1YVGD31BOL5215786, was manufactured by Mazda Motor Corporation and assembled by AutoAlliance International, Inc. The vehicle was

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These are the only remaining defendants in this case.

equipped with an occupant restraint system that included a two-point motorized shoulder belt and manual lap belt. Plaintiff alleges that the seat belt system was defectively designed and that defendants failed to adequately warn of the alleged defect.

2. Summary Judgment Standard

Summary judgment is appropriate if the moving party establishes that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co., 802 F.2d 1352, 1356 (11th Cir. 1986); Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1296 (11th Cir. 1983); Fed.R.Civ.P. 56(c). To determine if the moving party meets its burden of proof, the court must view all evidence and inferences to be drawn from it in a light most favorable to the party opposing the motion. Carlin Communication, 802 F.2d at 1356; Sweat v. Miller Brewing co., 708 F.2d 655, 656 (11th Cir. 1983).

The Supreme Court has addressed the burdens of proof which each party must carry on a motion for summary judgment and stated that:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986) (quotation omitted).

The nonmoving party is required to identify specific facts which demonstrate that there is a genuine issue for trial and may not rest on the allegations or denials in its pleadings. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). However, in order to survive a motion for summary judgment, the non-moving

party need only present evidence form which a jury might return a verdict in his or her favor. If he or she does so, there is a genuine issue of fact that requires a trial. Id. at 257, 106 S. Ct. at 2514.

3. Analysis

The Mazda defendants move for summary judgment on the grounds that federal law preempts plaintiff's claims. In the alternative, the Mazda defendants' state that plaintiff's claims have no basis under Georgia state law.

On the preemption issue, defendants do not dispute that there is a presumption against preemption./ See, e.g., Maryland v. Louisiana, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129 (1981). Defendants note, however, that the issue of preemption is a question of law for the court to decide. Pokorny v. Ford Motor Co., 902 F.2d 1116, 1119 (3rd Cir.), cert. denied 498 U.S. 853, 111 S.Ct. 147 (1990). Defendants argue that 15 U.S.C. § 1392(d) of the National

Traffic and Motor Vehicle Safety Act (the "Safety Act"), 15 U.S.C. § 1381 et seq., and Federal Motor Vehicle Safety Standard 208, 49 C.F.R. § 571.208 ("FMVSS" or "Standard" 208) impliedly preempt plaintiff's claims.[2] Section 1392(d) provides:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The Safety Act also states that compliance with a federal motor vehicle safety standard "does not exempt any person from any liability under common law." 15 U.S.C. §

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[2] Defendants appear to make an express preemption argument also, but such an argument has been rejected by the Eleventh Circuit and other courts, thus will not be addressed.

1397(k). This is known as the "savings clause."[3]

In Montage by Montag v. Honda Motor Co., Ltd., 75 F.3d 1414, 1417 (10th Cir.), cert. denied, 117 S.Ct. 61 (1996), the court rejected the argument that, under Cipollone v. Liggett group, Inc., 505 U.S. 504, 112 S.Ct. 2608 (1992), courts may not consider implied preemption where Congress has provided and express preemption clause. As noted in Montag, in Freightliner Corp. v. Myrick, ___ U.S. ___ 115 S.Ct. 1483 (1995) the Supreme Court "held that the existence of an express preemption provision does not preclude an implied preemption analysis. . . . At best, an express preemption clause supports the inference that no implied preemption exists." Montag, 75

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[3] Sections 1392 and 1397 were repealed on July 5, 1994, and replaced by 49 U.S.C. § 30103(b)(1) and (e), respectively. The new provisions in § 30103 are similar to the repealed ones. Since the parties have not addressed this change in law or its significance, if any, to this case, and it appears that the analysis of defendants' motion would not be altered, the court will not further discuss this change.

F.3d at 1417 (citations omitted). "Although not explicitly stated, the Court clearly believed that the express preemption clause of the Safety Act did not preclude implied preemption analysis." Id.[4] Thus, the court rejects plaintiff's position that implied preemption analysis is inappropriate.

With respect to the issue of implied preemption, the Supreme Court stated in Myrick,

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, *English v. General Electric co.*, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2274-2275, 110 L.Ed.2d 65 (1990), or when state

[4] While not crucial to the court's ruling, the court notes that defendants incorrectly represented to the court in their June 10, 1996 reply brief that the Supreme Court petition for certiorari filed by Ford Motor Co., in Tebbetts v. Ford Motor Co., 140 N.H. 203, 665 A.2d 345 (1995) was pending (defendants state the court in Tebbetts misapplied Cipollone and Myrick). In fact, the Court denied Ford's petition on January 16, 1996 and denied a petition for rehearing on February 26, 1996. In any event, the court is not bound by, and has not considered, Tebbetts.

> law is in actual conflict with federal law. We have found implied conflict pre-emption where it is "impossible for a private party to comply with both state and federal requirements." *id.*, at 79, 110 S.Ct., at 2275, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

Myrick, 115 S.Ct. at 1487 (emphasis added).

In Myrick, a case involving anti-lock braking systems ("ABS"), the court rejected the Defendants' implied preemption argument on the grounds that plaintiff's common law claims do not conflict with federal law -- more specifically, Defendants certainly can comply with both federal and state law "because there is simply no federal standard for a private party to comply with." Id. at 1488. In other words, neither the Safety Act nor its regulations regulate the use of ABS devices. Id.

In the instant case, however, plaintiff's claims surround an allegedly defectively designed seat belt

system.[5] In contrast to ABS devices, FMVSS 208 addresses seat belts and air bags. The United States Court of Appeals for the Third Circuit has found that state common law claims based on a lack of air bags are preempted if the vehicle is equipped with an alternate protection system permitted by the Safety Act. Pokorny v. Ford Motor Co., 902 F.2d 1116, 1123 (3rd Cir.), cert. denied, 498 U.S. 853, 111 S.Ct. 147 (1990). Moreover, plaintiff acknowledges that she is not making a "no air bag claim."

With respect to seat belts, FMVSS 208 provides that manufactures have various options: (1) a front/angular automatic protection system (49 C.F.R. §

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[5] Plaintiff states that she has a strict liability claim and a failure to warn claim (thought plaintiff's complaint also contains a negligence claim and a breach of warranty claim). Since the court's treatment of the latter two claims apparently would be the same as the treatment of the former two claims, the court will not specifically address the negligence claim and a breach of warranty.

571.208, S4.1.2.1); (2) head-on automatic protection system (49 C.F.R. § 571.208, S4.1.2.2); or (3) lap and shoulder belt protection system with belt warning (49 C.F.R. § 571.208, S4.1.2.3). In addition, FMVSS 208, S4.5.3 provides: "[A] seat belt assembly that requires no action by vehicle occupants (hereinafter referred to as an "automatic belt") may be used to meet the crash protection requirements of any option under S4, and in place of any seat belt assembly otherwise required by that option."

Plaintiff admits in her response brief that "[i]t is undisputed that FMVSS 208 permits (but does not require) manufacturers to select a passive restraint system choice."[6] Still, Plaintiff argues that -- while the car at issue

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[6] Passive restraints include air bags or "passive" seatbelts. "Passive seatbelts, also called "automatic" seatbelts, move into place automatically when a passenger enters a vehicle and closes the door." State Farm Mut. Auto. Ins. Co. v. Department of Transp., 680 F.2d 206, 208 (D.C. Cir. 1982), vacated on other grounds, 463 U.S. 29, 103 S.Ct. 2856 (1993). Passive restraint systems have been defined as "protective systems that require 'no action by

may have technically complied with the applicable federal standards -- the vehicle did not comply with the "spirit" of the applicable federal standards. Plaintiff also opines that these standards are inadequate. Plaintiff's position is that an alternative design was available that would have improved the crash-worthiness of the car. Plaintiff suggests a three-point manual seat belt with an air bag, or a three-point passive system. Plaintiff also suggests chimes and warnings in addition to those in the Mazda at issue. In sum, plaintiff states that there should be no implied preemption where -- as here, plaintiff contends -- it is possible to com.ply with the applicable federal standards and state tort law.

While implied preemption exists when it is impossible to comply with both federal and state law, Myrick, 115 S.Ct. at 1487, the converse is not necessarily

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vehicle occupants.'" Id. at 210.

true. In other words, even if it is possible to comply with both, implied preemption is appropriate "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Id. (quotation omitted). In the instant case, the occupant restraint system in the Mazda vehicle at issue included a two-point motorized shoulder belt and manual lap belt. The uncontroverted evidence -- most notably, the affidavit of Jeffrey R. Miller and plaintiff's admissions -- mandates that the seat-belt system at issue complies with FMVSS 208.[7] As defendants, note, allowing plaintiff to utilize Georgia state law to bring a defective design claim would present various obstacles to the purposes and objectives for FMVSS 208 -- such as punishing a manufacturer for exercising an option given by federal regulations. Defendants also cite the destruction of uniformity and interference with the

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[7] The court declines plaintiff's request that the court find this regulation inadequate or otherwise unenforceable.

federally-mandated phase-in. See only O'Bryan v. Volkswagen of America, Inc, 838 F.Supp. 319, 324 (W.D. Ky. 1992) (the plaintiff's state law claims against the defendant manufacturer for failing to utilize a manual lap belt were impliedly preempted); Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), cert. denied., 494 U.S. 1065, 110 S.Ct. 1781 (1990); Heath v. General Motors Corp., 756 F.Supp. 1144 (S.D. Ind. 1991). thus, plaintiff's claims in this case are impliedly preempted.[8]

B. The Mazda Defendants' Motion to Extend Time to File Pretrial Order

The Mazda defendants move this court for an extension of time to file a proposed consolidated pretrial order until thirty (30) days after the court rules on

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[8] Since plaintiff's defective design claims are preempted, the court will not address plaintiff's failure to warn claim, as it is premised on a defective design. Nor will the court discuss whether plaintiff's claims have a basis under Georgia state law.

defendants' motion for summary judgment. Plaintiff does not oppose defendants' motion for summary judgment. Plaintiff does not oppose defendants' request. Since it appears that this Order disposes of all of plaintiff's claims, thought, the court DISMISSES as MOOT the Mazda defendants' motion to extend time to file pretrial order.

CONCLUSION

Therefore, after due consideration, this court (1) GRANTS the Mazda defendants' motion for summary judgment and DIRECTS that the clerk DISMISS this case and (2) DISMISS as MOOT the Mazda defendants' motion to extend time to file pretrial order.

SO ORDERED. this 22nd day of November, 1996.

/s/ Horace T. Ward
HORACE T. WARD, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-8021

JULIETTE IRVING, as Guardian of the Persons and Property of BRYANA BASHIR, and as Administratrix of the Estate of BONITA L. IRVING, Deceased,

Plaintiff-Appellant,

versus

MAZDA MOTOR CORP. a.k.a. Mazda Motors Corp. f.k.a. Toyo Kogyo. Ltd.,
MAZDA (NORTH AMERICA), INC.,
et als,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___F.2d ___).

Before: HATCHETT, Chief Judge, EDM
COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED ;
of this panel nor other judge in regular activ
Court having requested that the Court
rehearing en banc (Rule 35, Federal Rule
Procedure; Eleventh Circuit Rule 35-5), th
of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE